

Congress of the United States
Washington, DC 20515

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August 15, 2019

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street NW
Washington, D.C. 20554

Chairman Pai:

I write to urge the Federal Communications Commission to issue a Public Notice seeking additional comment on the proposed merger between T-Mobile and Sprint.

On July 26, 2019, the Justice Department announced that it reached a settlement with T-Mobile and Sprint, stating that a divestiture to Dish Network Corporation of Sprint's prepaid business would resolve its concerns with the transaction.¹ The Department's proposed settlement agreement is significantly different than the underlying transaction as originally proposed,² raising substantial new issues that affect competition and the public interest.³ In addition to the inclusion of remedies that raise new concerns about the competitive effects of the proposed merger, the proposed settlement adds Dish as a new party to the transaction,⁴ along with other changes not reflected in the public record on the proposed transaction.⁵

As I have noted before, the proposed merger of T-Mobile and Sprint is presumptively illegal under decades of black letter law and the Justice Department's merger enforcement guidelines.⁶

¹ Press Release, Dep't of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), <https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package>.

² United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. July 26, 2019), <https://www.justice.gov/opa/press-release/file/1187706/download>.

³ Notice of *Ex Parte* filed by Communications Workers of America, Public Knowledge, Free Press, Common Cause, New America's Open Technology Institute, NTCA – The Rural Broadband Association, and Rural Wireless Association, WT Docket No. 18-197, at 4 (filed Aug. 13, 2019).

⁴ *Id.*

⁵ Notice of *Ex Parte* filed by Communications Workers of America, Public Knowledge, Free Press, Common Cause, New America's Open Technology Institute, NTCA – The Rural Broadband Association, and Rural Wireless Association, WT Docket No. 18-197, at 2 (filed Aug. 13, 2019).

⁶ See generally *The State of Competition in the Wireless Market: Examining the Impact of the Proposed Merger of T-Mobile and Sprint on Consumers Workers, and the Internet: Hearing Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2019)

Both the original transaction and proposed settlement agreement raise the threat of higher phone bills, less choice, fewer jobs, and worse wages for hardworking Americans.⁷ The prospect of these harmful effects for working people demands a comprehensive and transparent review.

Notwithstanding these wide-ranging and substantial negative effects, the Commission's review of the transaction appears to be incomplete. Commissioner Jessica Rosenworcel recently testified that the Commission's process for reviewing the proposed transaction has been "highly unusual" and resembles "backroom dealing."⁸ As she noted, "I have no economic analysis, legal analysis or paper before me and yet my colleagues have announced that they are going to support this transaction via press release."⁹ Since then, both Commissioners Rosenworcel and Geoffrey Starks have called for a public comment on the proposed settlement due that substantial changes of the structure of the transaction.¹⁰

A coalition of public interest and labor groups—including Public Knowledge, Free Press, and the Communications Workers of America (CWA)—have also expressed concerns about the Commission's review process. They note that the remedies negotiated by the Commission and Department "represent significant changes to the original transaction and raise new and important competition issues."¹¹ In light of these changes, this coalition has likewise urged to the Commission to seek public comment to protect the integrity of the agency's merger review process.¹²

In addition to these considerations, several trade associations that represent rural wireless customers have also noted that the lack of public comment for the proposed settlement may violate the Administrative Procedure Act.¹³ In a request filed with the Commission in support of

⁷ *Id.*; Press Release, Comm'n Workers of America, CWA: Divestiture Agreement with DISH Creates New T-Mobile Customer, Not a New Competitor (July 26, 2019), <https://cwa-union.org/news/releases/cwa-divestiture-agreement-dish-creates-new-t-mobile-customer-not-new-competitor>; Gigi Sohn, *Gigi Sohn Statement on DoJ Approval of T-Mobile-Sprint Merger*, GIGISOHN.COM (July 26, 2019) <http://gigisohn.com/media/gigi-sohn-statement-on-doj-approval-of-t-mobile-sprint-merger/>.

⁸ David Shepardson, *Democratic commissioner questions FCC review of Sprint T-Mobile merger*, REUTERS (June 12, 2019), <https://www.reuters.com/article/us-sprint-corp-m-a-t-mobile-us-fcc/democratic-commissioner-questions-fcc-review-of-sprint-t-mobile-merger-idUSKCN1TD2H6>.

⁹ *Id.*

¹⁰ Jessica Rosenworcel (@JRosenworcel), TWITTER (July 26, 2019, 8:50 AM) <https://twitter.com/JRosenworcel/status/1154781145260859392>; Geoffrey Starks (@GeoffreyStarks), TWITTER (July 26, 2019), <https://twitter.com/GeoffreyStarks/status/1154815569503371264>

¹¹ Notice of *Ex Parte* filed by Communications Workers of America, Public Knowledge, Free Press, Common Cause, New America's Open Technology Institute, NTCA – The Rural Broadband Association, and Rural Wireless Association, WT Docket No. 18-197, at 2 (filed Aug. 13, 2019).

¹² *Id.*

¹³ Letter from Louis Peraertz, Vice President, Wireless Internet Service Providers Association, to Marlene H. Dortch, FCC Secretary, Fed. Comm'n Comm'n 6 (Aug. 8, 2019) <https://ecfsapi.fcc.gov/file/10808532902531/Sprint%20-%20T-Mobile%20Letter.pdf>; *In the Matter of Applications of T-Mobile US, Inc. and Sprint Corporation, Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations*, Informal Request for Commission Action, WT Docket No. 18-197 (filed Aug. 5,

Public Notice seeking comment, they note that it “would be arbitrary and capricious to rule on the pending applications without considering evidence of the substantial changes to what is being proposed.”¹⁴ In response to this concern, the merging parties argue that the APA’s guarantees of procedural fairness do not apply to this proceeding because it is not a rulemaking.¹⁵

Notwithstanding this claim, judicial review under the APA applies broadly to agency action—including orders and licensing—and not solely to agency rulemaking.¹⁶

Finally, there is no urgency that would trump the importance of additional opportunity for public comment.¹⁷ The proposed transaction has been challenged in court by a bipartisan coalition of 16 state attorneys general,¹⁸ which have raised concerns that the merger will result in higher prices and reduced quality. This case will not go to trial until December, and the merging parties have agreed not to close their deal until after the trial.¹⁹ The Department’s proposed settlement agreement—which is necessary to address the Department’s antitrust concerns—is also under review by the U.S. District Court under the Tunney Act, which requires a comment period of 60 days.²⁰ As the Department has not yet published the proposed consent decree or a competitive

2019), https://gallery.mailchimp.com/fbbfb788a3dee3243d1271c57/files/ccc3d9d9-a53c-4e6b-b138-ff3b5f6b95f7/rwainformalrequesttmo_FINAL.pdf

¹⁴ *Id.*

¹⁵ Before the Federal Communications Commission, Ex Parte Submission of the United States Department of Justice, GN Docket No. 09-51 3 n.6 (2019), <https://ecfsapi.fcc.gov/file/1080922222715/Joint%20Opposition%20to%20Requests%20for%20Commission%20Delay%20%202019.08.09.pdf>

¹⁶ 5 U.S.C. § 706(2); 5 U.S.C. 551 (6)-(8); Former Republican Commissioner Harold W. Furchtgott-Roth has also testified in support of this view, stating that protecting against arbitrary license transfers by the Commission is a “core function” of the APA. Testimony of Federal Communications Comm’r Harold W. Furchtgott-Roth Before the U.S. House of Representatives Comm. on the Judiciary, Subcomm. on Commercial and Administrative Law Oversight Hearing (May 25, 1999) (citations omitted), attached to Separate Statement of Comm’r Harold Furchtgott-Roth in Applications of Airtouch Communications, Inc. Transferor, and Vodafone Group PLC Transferee, for Consent to Transfer Control of Licenses and Authorizations, 14 F.C.C.R. 9430, 9472 (1999), https://transition.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr922.html.

¹⁷ Letter from Louis Peraertz, Vice President, Wireless Internet Service Providers Association, to Marlene H. Dortch, FCC Secretary, Fed. Comm’n Comm’n 6 (Aug. 8, 2019) <https://ecfsapi.fcc.gov/file/10808532902531/Sprint%20-%20T-Mobile%20Letter.pdf>; *In the Matter of Applications of T-Mobile US, Inc. and Sprint Corporation, Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations*, Informal Request for Commission Action, WT Docket No. 18-197 (filed Aug. 5, 2019), https://gallery.mailchimp.com/fbbfb788a3dee3243d1271c57/files/ccc3d9d9-a53c-4e6b-b138-ff3b5f6b95f7/rwainformalrequesttmo_FINAL.pdf

¹⁸ Bevin Fletcher, *State opposition ramps against T-Mobile/Sprint deal*, FIERCE WIRELESS (Aug. 13, 2019) <https://www.fiercewireless.com/regulatory/state-opposition-ramps-against-t-mobile-sprint-deal>

¹⁹ Tony Romm, *State attorneys general sue to block merger between Sprint and T-Mobile*, WASH. POST (June 11, 2019), <https://www.washingtonpost.com/technology/2019/06/11/state-attorneys-general-sue-block-merger-between-sprint-t-mobile/>

²⁰ Press Release, Dep’t of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), <https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package>

impact statement in the Federal Register, the Tunney Act comment period has not yet even begun.

These circumstances weigh heavily in favor of the Commission issuing a notice seeking additional comments. I therefore urge the Commission to protect the public's opportunity to comment on the merits of the proposed merger as modified by the Department's proposed settlement.

Sincerely,



David N. Cicilline
Chairman
Subcommittee on Antitrust, Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives

cc: The Honorable Jerrold Nadler, Chairman, Committee on the Judiciary
The Honorable Doug Collins, Ranking Member, Committee on the Judiciary
The Honorable F. James Sensenbrenner, Ranking Member, Committee on the Judiciary
The Honorable Michael O'Rielly, Commissioner, Federal Communications Commission
The Honorable Brendan Carr, Commissioner, Federal Communications Commission
The Honorable Jessica Rosenworcel, Commissioner, Federal Communications
Commission
The Honorable Geoffrey Starks, Commissioner, Federal Communications Commission
The Honorable Makan Delrahim, Assistant Attorney General, Department of Justice